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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CRISTIAN ERNESTO BENITEZ,

Defendant and Appellant.

G038375

(Super. Ct. No. 05NF4322)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Warren P. Robinson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr. and Maxine Cutler, Deputy Attorneys General, for Plaintiff and Respondent.

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Cristian Ernesto Benitez appeals from a judgment entered after a jury convicted him of conspiracy to commit second degree robbery while armed with a firearm. The trial court found true allegations he had a prior “strike” within the meaning of the “Three Strikes” law and a prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a)(1).¹ The court sentenced Benitez to a total aggregate prison term of 11 years.

On appeal, Benitez challenges several of the trial court’s evidentiary rulings, contending the court’s rulings violated state evidentiary rules and deprived him of his federal Constitutional rights to due process and a fair trial. We find his contentions meritless and affirm the judgment.

I

FACTS

In November 2005, Cynthia Segovia lived with her parents, Maria and Ysaías Segovia, at her parent’s Lakeview Avenue home in La Habra, California. At the time, Cynthia worked for her mother, who had been operating a jewelry business at the Paramount Swap Meet for approximately 20 years. Maria and her family conducted business from the family home, and they used a van to transport tables, showcases, and gold jewelry to and from the swap meet.

On the morning of November 5, Cynthia noticed three Hispanic males walking down the middle of Lakeview Avenue. She did not recognize these individuals, and she watched them as they walked by her home and stared at the van. Cynthia estimated the van contained approximately \$150,000 worth of jewelry and equipment that morning. After a full day at the swap meet, the family packed the van for the ride home. They left the swap meet in a three-vehicle caravan. Ysaías drove the van, Cynthia

¹ All further undesignated statutory references are to the Penal Code.

followed him in her car with Maria as her passenger, and Robert, Cynthia's uncle, followed in a third car.

Robert arrived home first and parked his car across the street from the Segovia's home. Ysaías parked the van in the driveway, and Cynthia parked her car behind the van. After he parked his car, Robert noticed a woman sitting inside a car that was parked adjacent to the Segovia home. Cynthia and Maria did not see anyone when they drove into the driveway, but they quickly noticed two men come out from behind some tall bushes that bordered the driveway. One of the men was wearing a tan jacket and a baseball cap. The other man was wearing a dark, hooded sweatshirt and he had the hood pulled over his head. When the man in the tan jacket moved toward the rear of the van, Cynthia started to honk her car horn. She continued to honk the horn as she backed out of the driveway, made a U-turn, and activated her car's On Star system to alert police.

Cynthia and Maria watched the men as they fled from the van and walked down Lakeview Avenue. La Habra Police Officer Nicholas Baclit responded to Cynthia's call. Cynthia pointed out Benitez and Neal and he detained them. Cynthia identified Benitez as the man wearing the dark, hooded sweatshirt. Benitez identified his cohort as Davon Neal. Another witness, Celia Rojas, also saw Benitez and Neal flee the Segovia's driveway and walk down Lakeview Avenue.

Baclit conducted a patdown search of Benitez for weapons before placing him in a patrol car. Initially, Robert said that Neal had thrown a gun into some ivy on the west side of Lakeview Avenue just before Baclit detained him. However, Robert later claimed that he had not seen Neal throw a gun into the ivy. Baclit asked Benitez if there was a weapon somewhere in the area. Benitez asked Baclit to remove Neal from the area because he did not want to be "rat," but he did not help Baclit. Another La Habra Police Officer responded to the scene with his police service dog, Paco, and Paco found a .32 caliber Walther handgun in a patch of ivy approximately six feet from where Neal had

been detained. Although the ivy was wet to the touch, the gun Paco found was dry, and this suggested to the officers that it had been recently discarded.

Benitez and Neal were transported to the La Habra Police station. Detective David Smith arrived at around 10:00 p.m. and was told by other officers that Neal and Benitez were suspected of attempting a home invasion robbery. Benitez was taken to an interview room, and Smith read him the La Habra Police Department's standard *Miranda*² advisement. Benitez said he understood each of the rights as they were read to him. After advising Benitez of his *Miranda* rights, Smith did not expressly ask Benitez if he wanted to waive to his rights. Instead, Smith asked Benitez, "What's going on?" When Benitez repeated Smith's question back to him, Smith said, "Talk to us man."

For the next hour or so, Benitez talked to Smith and Smith's partner, Detective Williams. He first said that a woman offered to drive them from Los Angeles to a place where they could meet other women. She dropped them off on Lakeview Avenue and they were waiting for her to return when police officers arrived and detained them. Benitez said he was standing in the bushes because he was lost. After Smith admonished Benitez to tell the truth, Benitez said he feared retribution if he continued to talk, but then told Smith that he had been driven to the area by two men for the purpose of picking up a package, contents unknown. Benitez said that he was just standing in the bushes waiting for something to happen when the Segovia's family came home. He denied knowing that Neal possessed a gun.

At trial, Benitez proved through the testimony of an Orange County Crime Lab specialist and a senior forensic specialist that there were no identifiable fingerprints on the gun, and that DNA testing indicated that at least three people, excluding Benitez, had come into contact with the gun.

² *Miranda v. Arizona* (1966) 384 U.S. 436.

II DISCUSSION

Mistrial Motion

Defense counsel moved for a mistrial during Maria's testimony. The basis for the motion was a defense pretrial motion to exclude any references to a conversation Cynthia had with one of her mother's employees. According to counsel's offer of proof, after Cynthia saw three strangers walking down the middle of Lakeview Avenue, she made a telephone call to one of her mother's employees. The employee contacted "some of his colleagues in the criminal element" and reported to Cynthia that there was "a plan or a plot to commit a robbery somewhere in her neighborhood." The court ordered the prosecutor "not to produce that evidence in front of the jury" and to admonish Cynthia accordingly. However, the parties agreed Cynthia could testify about her observations on the morning of November 5.

At trial, Cynthia testified that after Benitez and Neal emerged from the bushes, her mother screamed, "Oh, my God. Oh, my God. They're here, they're here." Defense counsel objected on hearsay grounds. The trial court overruled the objection, concluding Maria's statement was a spontaneous statement and therefore admissible. (Evid. Code, § 1240.)³

In the midst of Maria's testimony about what the two men did after they emerged from the bushes, the prosecutor asked her, "Ms. Segovia, you indicated that one of the individuals crossed the street; right? After you began honking your horn? Maria replied, "Uh-huh." Then the prosecutor asked, "What did you see the other person do?"

³ Evidence Code section 1240 states, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

Maria responded, “What did I see? Just walking, a very relaxed, going up to the van, and I started screaming. We had the Envoy —the On Star Envoy guy on. ‘Oh my God,’ I started screaming. ‘Those guys are here. They’re going to come to us.’” Defense counsel objected on grounds Maria’s testimony was hearsay and nonresponsive to the prosecutor’s question. The court stopped the proceedings and excused the jury from the courtroom.

Outside the presence of the jury and the witness, defense counsel moved for a mistrial on the grounds that Maria’s answer touched on matters previously excluded by the court. Counsel argued Cynthia and Maria’s statements “would lead the jury to believe that they had knowledge or a belief that there was actually a plot to commit this crime” The court denied the mistrial motion, explaining that although Cynthia and Maria’s statements touched on evidence that had been ruled inadmissible, there was no evidence the jury actually heard about Cynthia’s conversation with their employee. Therefore, the court determined, there had been no prejudice to the defense. Ultimately, the court granted defense counsel’s motion to strike the disputed portions of their testimony, and advised the jury to disregard Cynthia and Maria’s testimony concerning Maria’s out-of-court statements.

Benitez contends the trial court erred by denying his mistrial motion. Generally, “[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.” [Citation]. Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness’s volunteered statement can also provide the basis for a finding of incurable prejudice. [Citations.]” (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581.)

An appellate court reviews the lower court’s ruling on mistrial motions under the abuse of discretion standard. (*People v. Burgener* (2003) 29 Cal.4th 833, 873.)

We find no such abuse here. Cynthia and Maria’s testimony regarding Maria’s out-of-court statements were ambiguous outbursts at best. We do not agree with Benitez’s characterization of Maria’s statements as “inexorably” leading the jury to conclude Maria had undisclosed information about him, or that the statements were otherwise “devastating” to the defense case. Under the circumstances, it is more likely the jury understood Maria’s statements as a reaction to the imminent threat posed by two men, Neal and Benitez, emerging unannounced out of the bushes, and not that Maria had undisclosed information about a plan or plot to commit a robbery. There were no other reference to the contents of Cynthia’s telephone calls about the planned robbery, references to her knowledge of this rumor, or even evidence that she told her mother about this rumor. Moreover, the court ultimately instructed the jury to disregard the statements, and we must presume the jury followed the court’s instructions. (*People v. Burgener, supra*, 29 Cal.4th at p. 870.)⁴

However, even assuming error we find no prejudice. Benitez was a long way from home when detained by Officer Baclit, and he failed to articulate a legitimate reason for his presence in the Segovia’s neighborhood. Witnesses testified that he and Neal were hiding in the bushes when the Segovia family came home from their daily trek to the swap meet. They emerged from the bushes and quickly moved toward the van. They aborted whatever plan they had when Cynthia honked her car horn. Together they fled the Segovia driveway and headed away from scene on foot down Lakeview Avenue. When detained, Neal had a gun in his possession. Under the circumstances, it is not reasonably probable the jury would have reached a more favorable verdict in the absence

⁴ Because the trial court later struck this portion of Cynthia’s testimony on other grounds we need not determine if the trial court correctly ruled on Benitez’ hearsay objection.

of Maria's out-of-court statements. (*People v. Harris*, *supra*, 22 Cal.App.4th at p. 1581.)⁵

Benitez' Post-Arrest Statement

Prior to trial, Benitez moved to suppress the statement he made to Smith at the police station following his arrest. Benitez claimed his statement was not voluntary and therefore should have been excluded under *Miranda*. At the Evidence Code section 402 hearing, Smith, who was off duty at the time, testified that he was contacted by his watch commander at approximately 9:00 p.m. on November 5, and that he had been directed to come to the La Habra Police Station to interview a suspect. When he arrived at the station, the arresting officers explained the circumstances of Benitez' arrest, and Smith met with his partner to discuss the situation. At approximately 10:30 p.m., Benitez was brought into an interview room. Detective Williams, Smith's partner, turned on a tape recorder and offered Benitez a chair.

When Smith joined them in the interview room, he advised Benitez of his *Miranda* rights by reading them from his department's standard advisement form. As Smith read the form, he asked Benitez if he understood each of the rights as explained. Benitez answered "yes" when questioned about whether he understood each of these rights. At the conclusion of the advisement, Smith did not specifically ask Benitez if he wanted to waive his *Miranda* rights (Smith explained that such a question is "not required by law"). Instead, Smith asked Benitez, "What's going on?" Benitez responded, "What's going on." Smith replied, "Talk to us man." Benitez replied that he had found a computer behind the patrol car. After a couple of clarification questions, Williams responded, "Okay let's go way back, farther back than that. Why don't you tell us what

⁵ Nor do we find that the court's direction to disregard these statements amounted to a violation of Benitez' federal Constitutional rights to due process and a fair trial. (See *People v. Gurule* (2002) 28 Cal.4th 557, 652.)

happened tonight that got you into the police car.” Benitez then spent the next hour or so giving his statement. He signed the La Habra Police Department’s standard *Miranda* waiver form at 11:43 p.m. at the conclusion of the interview.

The court denied Benitez’ motion to suppress, stating, “nothing in the record . . . and I want to repeat . . . nothing [] demonstrates, one, that the defendant did not understand his *Miranda* rights. To the contrary, all the evidence indicates from his own statement that he understood the rights, and from reading the entire transcript . . . the court cannot, cannot find any indication of any hesitancy, any reluctance, any evidence to suggest that the defendant did not want to talk to the police. [¶] To the contrary, from reading this entire interview, the only conclusion that the court can draw is that the defendant wanted to give information to the police.” At the defense request, the court excised certain statements that referred to Benitez’ prior arrest, time on juvenile probation, a probation violation proceeding, his ties to the Playboys criminal street gang, a possible connection between the gun Neal possessed and a Los Angeles homicide, the deportation of Benitez’ brother, and his incarceration at an honor ranch in Los Angeles County.

As Benitez concedes, an individual may expressly or impliedly waive the rights protected under the *Miranda* decision. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373; *People v. Whitson* (1998) 17 Cal.4th 229, 247-248.) Here, the totality of the circumstances supports a finding Benitez understood and impliedly waived his *Miranda* rights. (*Moran v. Burbine* (1986) 475 U.S. 412, 421-423. As the trial court noted, Benitez did not ask any questions or show the slightest hesitation in talking to Williams and Smith. The officers did not intimidate, threaten, or make promises of leniency to Benitez, and the record reflects no undue influence or coercion on their part. From the record it appears Benitez knowingly and voluntarily waived his *Miranda* rights. Consequently, we find no error in the trial court’s ruling and no violation of Benitez’ federal Constitutional right to remain silent.

Smith and Baclit's testimony

At trial, Smith stated, "I was told that officers had made an arrest of two individuals who they believed were going to attempt to do a home invasion robbery." Baclit, the officer who detained Neal and Benitez, agreed when the prosecutor asked the following leading question: "Did you respond to a potential robbery call [on] Lakeview Street in the City of La Habra?" Defense counsel objected to both statements as irrelevant, hearsay testimony. The trial court overruled his objections and admonished the jury to consider the officer's out-of-court statements solely for the purpose of explaining "what [Smith] did with th[e] information" and "what [Baclit] then did." Benitez contends the trial court erred by admitting these statements. We disagree.

Smith's testimony is not hearsay because it was not admitted for the truth of the matter stated. As the court stated, the evidence merely explained what happened when Smith arrived to take Benitez' statement, and the court explained to the jury that this evidence was admitted for the limited purpose of explaining Smith's actions. While Benitez contends it is unreasonable to expect jurors to follow the court's limiting instruction, we must presume the opposite. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Moreover, Smith also testified that he was a "robbery/homicide investigator" for the City of La Habra Police Department. Thus, the jury could surmise that Smith was investigating either a robbery or a homicide when he contacted Benitez simply by virtue of his current assignment. Under the circumstances, we find no prejudice even assuming the court should have prevented Smith from explaining what other officers told him about the investigation. And, in the absence of error, we also conclude that admission of Smith's testimony concerning what other officers told him, considered alone or in conjunction with evidence of Maria's out-of-court statements, did not violate Benitez federal Constitutional rights to due process and a fair trial.

We reach the same conclusion with respect to Baclit's testimony. In fact, the court interrupted the prosecutor's questioning of Baclit to advise the jury, "Once again, ladies and gentlemen, it's for you to decide whether there was a robbery and who did the robbery. The court's going to admonish you. I'm going to allow the witness to answer this question. It's offered for the limited purpose to then explain what he then did." The court was referring not only to Baclit's decision to detain Neal and Benitez, but also his later decision to ask Benitez if he possessed a weapon. The reason for Baclit's questions was relevant to the jury's credibility assessment of him as a witness. Although Benitez' counsel did not expressly question the reasonableness of Baclit's conduct, it is a standard defense tactic to undermine the prosecution's case by attempting to show the police conducted a shoddy investigation or rushed to judgment. As the trial court observed, Baclit's explanation for detaining Benitez and Neal and asking Benitez about a gun was relevant to demonstrate that he was not just "some rogue cop on the street looking to detain people for no reason at all"

However, even assuming error in the admission of this portion of Smith and Baclit's testimony, we find no prejudice. As noted above, it was no mystery that Smith and Baclit were investigating a potential robbery. Their statements merely confirmed what the jury already knew, i.e., that Benitez was charged with conspiracy to commit *a robbery*. Consequently, the admission of the officers' out-of-court statements explaining their purpose in contacting Benitez was not prejudicial and did not result in a violation of his federal Constitutional rights to due process and a fair trial.

Pre-Miranda Questioning

Benitez also claims Baclit should have advised him of his *Miranda* rights before asking him about a weapon. We also disagree with this assertion.

During a midtrial Evidence Code section 402 hearing outside the jury's presence, Baclit testified that at approximately 5:38 p.m. on November 5, he received a

dispatch call directing him to a residence on Lakeview Avenue in La Habra. Although he was initially told that he would act as an escort for the reporting party, he later received additional information “that a potential robbery had just occurred.” At Cynthia’s direction, Baclit detained Neal and Benitez, drew his weapon, and directed Benitez to lie on the ground. Baclit asked Benitez where he was from and why he was in La Habra. Benitez responded, “I’m from Los Angeles and I’m here visiting a girlfriend.” Baclit placed Benitez in handcuffs and moved him to the back of his patrol car. Baclit then explained to Benitez why he was being detained, and he asked Benitez “if there was any dangerous weapon that was discarded in the area” Benitez asked that Neal be removed from the area so that he would not “be looked at as a rat” if he cooperated. Although Benitez initially agreed to help Baclit locate the weapon, he never actually told the officer where to look for the gun.

The trial court ruled that Benitez had been in custody when he answered Baclit’s questions. However, the court ruled that with respect to statements Benitez made while in the back of Baclit’s patrol car, the statements concerning a weapon, these statements were admissible under the public safety exception. Benitez contends the court’s ruling violated his Fifth Amendment right to remain silent. He asserts the trial court improperly relied on the public safety exception because he and Neal were already in custody and therefore posed no immediate danger to the police or the public. We disagree.

In *New York v. Quarles* (1984) 467 U.S. 649, police officers apprehended a suspect and were confronted with the immediate necessity of ascertaining the location of a gun they had reason to believe the defendant had discarded in a supermarket. They asked the defendant where the gun was located before advising him of his *Miranda* rights. The defendant showed them where the gun was and the police retrieved it. At trial, the defendant claimed his statement directing the police to the gun, elicited prior to the *Miranda* warnings, was the product of custodial interrogation and therefore

inadmissible. The trial court agreed and excluded the defendant's statement directing the police to the gun, also excluding the gun itself and subsequent statements as illegal fruits of the *Miranda* violation.

The United States Supreme Court reversed, holding that the rationale of *Miranda* does not apply to circumstances where police officers ask questions reasonably prompted by their concern for public safety. (*New York v. Quarles, supra*, 467 U.S. at p. 655.) However, the Court limited this exception to situations where questioning is "necessary to secure [the officers'] safety or the safety of the public" (*Id.* at p. 659.) Here, Baclit initially responded as an escort for the reporting party, but he quickly learned that the reporting party believed a robbery was afoot. Baclit testified that in his experience, weapons or simulated weapons are frequently used to commit robberies. He also stated that he asked Benitez about weapons because he was concerned that "an innocent bystander could come in contact" with a weapon if it were not found. With these factors in mind, Baclit asked Benitez about discarded weapons. Benitez did not deny the presence of a weapon, he merely asked that Neal be removed so that he would not look like a rat for disclosing information. His response implied that there could be a weapon somewhere in the area, an implication that later proved to be true. Based on the totality of the circumstances, Baclit's concern for public safety was objectively reasonable and the situation provided the exigency required to apply the public safety exception. (See *People v. Simpson* (1998) 65 Cal.App.4th 854, 861; see also *People v. Gilliard* (1987) 189 Cal.App.3d 285, 291.) Thus, we find no error in the trial court's ruling and no violation of Benitez' Fifth Amendment right to remain silent.

III
DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.